

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

MIKE J. SHARP,

Debtor.

Case No. **05-60796-13**

MEMORANDUM of DECISION

At Butte in said District this 7th day of September, 2005.

In this Chapter 13 bankruptcy, after due notice, a hearing was held August 16, 2005, in Butte on the Chapter 13 Trustee's Amended Motion for Order Compelling Turnover Disgorgement of Attorney's Fees filed July 13, 2005, together with the objection thereto filed by attorney Charles A. Smith. The Chapter 13 Trustee, Robert G. Drummond, appeared at the hearing in support of the Amended Motion for Order Compelling Turnover Disgorgement of Attorney's Fees. Objecting attorney Charles A. Smith appeared at the hearing with attorney Robert Cummings. Debtor, Charles A. Smith and Chantelle R. McDuffie testified and Exhibits A, B, D and E were admitted into evidence without objection. At the conclusion of the hearing, the Court took the matter under advisement. This Memorandum of Decision sets forth the Court's findings of fact and conclusions of law.

Debtor testified that when his bills began mounting, Debtor used his credit cards to cover his day-to-day living costs. However, when Debtor's wages were no longer sufficient to cover the minimum payments due on Debtor's credit card bills, Debtor turned to the yellow pages in search of help from an attorney. Debtor found the name of Charles A. Smith and proceeded to have his

wife Carmen contact Mr. Smith regarding the possibility of filing bankruptcy.

Although Debtor's spouse Carmen did not testify at the hearing, it appears that Carmen contacted Mr. Smith's office. Carmen initially spoke with Mr. Smith. Mr. Smith testified that he explained the difference between Chapters 7, 11 and 13 of the Bankruptcy Code and also discussed fees and costs with Carmen at that time. Following the initial telephone conversation, a meeting between Mr. Smith and Carmen was scheduled, presumably for February 18, 2005. Carmen was advised to bring the appropriate fee of \$759.00 to the initial meeting.

The initial meeting between Mr. Smith and Carmen was, according to Mr. Smith, "probably" 1 hour. Mr. Smith provided Carmen with a booklet that asks potential debtors to list their assets, debts, etc. Exhibit A confirms that Carmen's initial meeting with Mr. Smith was held on February 18, 2005, and Carmen paid the sum of \$759.00 to Mr. Smith at that time.¹ Also, Exhibit B reflects that Carmen signed an Attorney Fee Contract with Mr. Smith on February 18, 2005, signing "Carmen Sharp for Mike J. Sharp." The fee of \$759.00 paid to Mr. Smith covers the Chapter 7 filing fee of \$209.00 and a flat fee to Mr. Smith of \$550.00.

As noted above, Mr. Smith advised Carmen of the differences between Chapters 7, 11 and 13 of the Bankruptcy Code. However, Mr. Smith conceded that he did not provide such information to Debtor, but assumed that such information was relayed by Carmen to Debtor. Unfortunately, it does not appear that such information was relayed from Carmen to Debtor. The Court also finds that Debtor was never advised on how his different obligations would be treated under different Chapters of the Bankruptcy Code.

¹ Debtor borrowed the \$759.00 from his mother and later repaid his mother by selling a boat after the commencement of Debtor's bankruptcy.

Mr. Smith did not have any conversations or contact with Debtor until the date Debtor signed his bankruptcy petition and schedules. According to Debtor, his initial meeting with Mr. Smith was brief because Mr. Smith had another engagement to attend. Debtor was told by Mr. Smith to simply sign the petition and schedules in the appropriate places. Upon questioning by Mr. Cummings, Mr. Smith did not deny the foregoing, but testified as follows:

Mr. Cummings: Do you recall how many other conversations you may have had with Mrs. Sharp?

Mr. Smith: Personally, about 3.

Mr. Cummings: And at the time that you had those, was that during the time of preparation of Exhibit D?

Mr. Smith: The ah, once the preliminary questionnaire is brought back to my office, I give it to my paralegal, my legal assistant, to prepare the necessary documents and then she deals directly with the clients to um, on any issues that are raised while she is concluding the preparation.²

* * *

Mr. Cummings: When did you first meet Mr. Sharp?

Mr. Smith: When he came to the office to sign the petition.

Mr. Cummings: And at that time, what transpired? Do you recall?

Mr. Smith: My procedure is to go into the library where we can sit at a table together and I pass sheet by sheet over to him and ask him to read it and make sure that it is true and correct

² According to the testimony of Mr. Smith's legal assistant, Chantelle McDuffie, she personally had contact with Debtor on one occasion and dealt with Carmen on all other occasions.

and to sign where indicated.

Mr. Cummings: Did you have with him at that time any discussions about the validity of filing a chapter 7 versus a chapter 13 with the schedules that he had prepared?

Mr. Smith: No, because a decision was made that they were going to file a Chapter 7.

Mr. Cummings: Who made that decision?

Mr. Smith: Apparently the wife did after conversing with him.

In addition to the foregoing testimony, Mr. Smith testified that he was not concerned that Debtor's monthly income of \$4,265.78 exceeded his monthly expenses of \$3,908.53 because Mr. Smith was not aware of any litmus test. Thus, Mr. Smith proceeded to file Debtor's Chapter 7 bankruptcy petition electronically on March 26, 2005.

Debtor did not have any further contact with Mr. Smith until the 341(a) meeting of creditors held April 21, 2005. Following the 341(a) meeting of creditors, Debtor's next contact with Mr. Smith was when Mr. Smith had a meeting with Debtor to advise him that there may be a problem with his Chapter 7 bankruptcy and Debtor may need to convert to Chapter 13 of the Bankruptcy Code. Upon learning that there may be a problem with his Chapter 7 bankruptcy, Debtor retained substitute counsel and voluntarily moved for the conversion of his Chapter 7 case to one under Chapter 13 of the Bankruptcy Code on May 12, 2005.

Following conversion of Debtor's case to Chapter 13 of the Bankruptcy Code, Debtor filed amended Schedules A, B, C, E and J on June 16, 2005. The amended Schedules were filed in part to correct errors in Debtor's original Schedules. For instance, Debtor amended Schedule A, which was originally left blank, to properly reflect Debtor's homestead interest in real property.

As a result of the foregoing events, the Trustee filed the instant Motion for Order Compelling Turnover Disgorgement of Attorney's Fees, arguing in part:

3. Charles Smith failed to provide services commensurate with the \$800 he was paid to represent the Debtor in the Chapter 7 case. The Attorney did not meet with or give sufficient legal advice to the Debtor prior to the filing of the Chapter 7 case. Schedules were prepared by the secretary and the Debtor's wife. The Debtor's Attorney, Charles Smith, failed to offer legal advice to the Debtor in any fashion prior to the meeting held pursuant to 11 U.S.C. § 341. The case was eventually converted to one under Chapter 13, the Debtor has been forced to seek and retain substitute counsel.

4. The Debtor paid Charles Smith \$800 which fees were not earned by the Debtor's Attorney, thus, this Court should enter an Order compelling Charles Smith to immediately turnover \$800 in fees to the Chapter 13 Trustee.

The evidence in this case substantiates the above statements made by the Trustee except that the Trustee acknowledged at the hearing that the fees collected by Mr. Smith were only \$550.00 rather than \$800.00 as stated in his Motion.

With regard to the disgorgement of fees in the instant case, 11 U.S.C. § 329 provides:

Debtor's transactions with attorneys

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to—

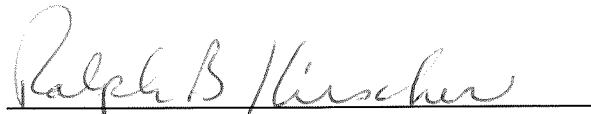
- (1) the estate, if the property transferred--
 - (A) would have been property of the estate; or
 - (B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or
- (2) the entity that made such payment.

Here, the evidence shows that Mr. Smith conducted himself in derogation of the requirements of the Bankruptcy Code and Rules. The fact that Mr. Smith made no effort to converse at any length with Debtor prior to the date Debtor's petition was filed demonstrates Mr. Smith's shocking disregard of the procedures under the Code and the rules that are intended to monitor and regulate the payment and disbursement of monies to professional who are officers of this Court and fiduciaries of the bankruptcy system. This Court will neither condone nor reward the practices followed by Mr. Smith in this case wherein he failed to, at a minimum, ascertain whether Debtor remotely understood the differences between various Chapters of the Bankruptcy Code, or if Debtor appreciated how different debts or payments would be treated under Chapter 7 of the Bankruptcy Code versus Chapter 13 of the Bankruptcy Code.

The evidence in this case firmly convinces this Court that Mr. Smith is not entitled to the fee of \$550.00 that he collected from Debtor. Such fee should be turned over to the Trustee and administered through Debtor's Chapter 13 plan. In accordance with the foregoing,

IT IS ORDERED that the Court will enter a separate order granting the Trustee's Amended Motion for Order Compelling Turnover Disgorgement of Attorney's Fees filed July 13, 2005; and directing that Mr. Smith immediately remit the sum of \$550.00 to the Trustee.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER

U.S. Bankruptcy Judge

United States Bankruptcy Court

District of Montana